IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No 792 of 1990

For Approval and Signature:

Hon'ble MR.JUSTICE A.M.KAPADIA
and
Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : NO

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

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STATE OF GUJARAT

Versus

NARU LALJI MUNIYA

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Appearance:

1. Criminal Appeal No. 792 of 1990
MR BD DESAI APP for appellant
NOTICE SERVED for Respondent

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CORAM : MR.JUSTICE A.M.KAPADIA
and
MR.JUSTICE H.H.MEHTA

Date of decision: 26/02/2003

ORAL JUDGEMENT

(Per : MR.JUSTICE A.M.KAPADIA)

1. This appeal which is filed under Section 378 of the Code of Criminal Procedure, 1973 ('the Code' for short) is directed against the judgment and order dated June 22, 1990 rendered by the learned Sessions Judge, Panchmahals at Godhra in Sessions Case No.25 of 1990 acquitting the respondent/original accused No.1 of the offence punishable under Section 17 of the Nearctic Drugs and Psychotropic Substances Act, 1985 ('the NDPS Act' for short).

2. The basic facts required to be stated for disposal of this appeal are that:

(i) On 18.10.1989 at 8.25 P.M. S.D. Gohil, Railway PSI Godhra together with staff members, were keeping watch on passengers on platform No.1 when Dehradun Express train entered on the platform. At that time, one person detrained from it and started going towards the railway yard. He was intercepted with the help of policemen and was brought near the bookstall in electric light on platform No.1. He suspected him and, therefore, the services of two persons were requisitioned to act as panchas and in their presence he was searched. During the course of the search one cloth bag was found from his waist. From the said bag four plastic packets were found. Out of the said four plastic packets they opened one plastic packet wherein semiliquid black coloured substance was found from which acute smell was emitting and the said substance was opium. On weighing the four packets it was found that there was 2 Kgs. and 500 Grams of weight. On inquiry from him about the pass/permit he said that he was not having pass or permit. During further search from him one railway ticket was also found from Bamaniya Railway Station to Godhra Railway Station. Thereafter on all the four packets signatures of the panchas were obtained. Slips having signatures of the panchas were affixed on all these four packets and seal of Godhra Railway Police was also affixed. Packet which was opened also again sealed for the purpose of sending to Forensic Science Laboratory ('FSL' for short) for chemical analysis. Thereafter complaint was filed against the said person. During the course of inquiry, fact was divulged that Narayan Madhusinh who is having licence to cultivate opium in Madhya Pradesh from whom he has received the opium. Therefore both the persons, that is, respondent herein and Naryan Madhusinh were arrested in connection with the said crime. After registering the complaint the statements of the witnesses were recorded. Out of the four packets of opium which were recovered,

one packet which was opened was sent to FSL for analysis and on receipt of the report in respect of the same S.D.Gohil PSI Godhra Railway Police station filed chargesheet against the respondent/accused No.1 as well as Narayan Madhusinh who was accused No.2 for commission of the offences under the NDPS Act in the court of learned Chief Judicial Magistrate, Panchmahals at Godhra.

(ii) On committal, the learned Sessions Judge, Panchmahals at Godhra framed charge at Ex.3 for commission of the offence punishable under section 17 of the NDPS Act. The charge was read-over and explained to respondent/original accused No.1 as well as accused No.2. They pleaded not guilty to the same and claimed to be tried.

(iii) To prove the culpability of the respondent/accused No.1 as well as accused No.2 the prosecution has examined in all four witnesses and also produced documents upon which heavy reliance was placed by the prosecution.

(iv) The learned trial Judge thereafter recorded further statement of the accused under Section 313 of the Code after recording of the prosecution evidence was over wherein also they denied the prosecution case and stated that they are innocent.

(v) On appreciation, evaluation and analysis of the evidence led by the prosecution witnesses, the learned Judge has disbelieved the case of the prosecution on the premise that there was not at all any case against accused No.2, Panchas have not supported the prosecution case, PSI who is a partisan witness, his evidence does not get corroboration from any independent witness. The three packets out of four packets recovered were not opened nor sent to FSL for chemical analysis and therefore he gave benefit of doubt to both the accused and resultantly acquitted the respondent/ present accused No.1 as well as accused No.2 by the impugned judgment and order which has given rise to the present appeal which is filed by the State against the original accused No.1 only.

3. Mr. B.D. Desai, learned APP for the State has taken us through the entire testimonial collections. It is submitted by him that while acquitting the respondent/original accused No.1, the learned Judge has misread the evidence of Gohil who is the complainant as well as investigating officer. According to the prosecution, offence against the respondent/original

accused No.1 is duly proved beyond reasonable doubt by the evidence of the Police Officer who has intercepted and searched in his presence and during the search four packets containing opium were found from him. It is also emphasized by him that in view of the report of the FSL in which it is stated that the contraband article was opium the whole matter requires to be reconsidered by this court and therefore the impugned judgment and order acquitting the respondent/accused No.1 deserves to be quashed and set aside by allowing this appeal and convict the respondent/accused No.1 for the offence for which he was charged.

4. Be it noted that the State has not preferred appeal against original accused No.2 and while admitting this appeal against respondent/original accused No.1, this court has issued bailable warrant in the sum of Rs.5000/- with one surety of the like amount against the respondent/accused No.1 which was duly served upon him. However, he elected not to remain present before us.

5. We have considered the submissions advanced by Mr. BD Desai, learned A.P.P. for the appellant - State. We have also perused the impugned judgment and order and record and the proceedings of Sessions Case No.25 of 1990. We have also considered the latest reported decisions of the Supreme Court with respect to the statutory provisions contained under the NDPS Act.

6. At the outset we state that there is no dispute that on on 18.10.1989 at 8.25 PM SD Gohil Railway PSI Godhra with his staff members kept vigil on passengers on platform No.1 when Dehradun Express Train entered on the platform. At that time one person/respondent herein, detrained from it and started going towards the railway yard. He was intercepted and from his possession four packets of opium wrapped in black rexin bag were found which were placed in a cloth bag on his waist. Thereafter necessary formalities were carried out by the PSI after requisitioning the services of two panchas in their presence.

7. Now so far as the evidence in this regard is concerned, P.W.1, Dinesh Muljibhai, Ex.16 and P.W.2, Suleman Ibrahim Shaikh at Ex.17 who were the panch witnesses were examined. They have not supported the prosecution case and therefore they were declared hostile and they were cross-examined by the A.P.P. and during cross-examination also nothing substantial was brought out from their evidence which would help the prosecution case.

8. Thereafter the prosecution also examined P.W.3, Shantilal Sukhalal, Ex.18, who is the Opium Officer of M.P. and his evidence is not at all material for our purpose as he was examined just to ascertain whether original accused No.2 was having pass/permit to cultivate opium. From his evidence it was established that original accused No.2 was having pass/permit to cultivate opium in MP and therefore he was rightly acquitted and the State has rightly not filed appeal against him.

9. Thereafter the prosecution examined S.D. Gohil, P.W.4, at Ex.19, who was at the relevant time PSI at Godhra Railway Police Station. He has inter alia testified how he kept vigil and how accused No.1 was intercepted and the manner and method in which person of accused No.1 was searched and from him contraband article was recovered in the presence of panchas. It is settled principles of law by catena of decisions that evidence of police officer and his companion of raiding party can be relied upon to base the conviction if the said evidence is consistent, natural, free from doubt and of a sterling quality. However, if the said evidence is bristled with contradictions and police officer has not observed the statutory provisions contained under the NDPS Act, it cannot be relied upon to base the conviction of the accused. In the instant case it has come in evidence that four packets were recovered from the respondent. Out of four packets only one packet was opened. Rest of the three packets were neither opened nor sent to the FSL for chemical analysis and therefore the important question which arises for our consideration is as to whether the investigating officer has taken necessary care and caution while recovering the contraband article from the respondent/accused No.1. Admittedly he has opened only one packet and therefore a serious doubt is raised whether the remaining three packets also were containing contraband article opium.

10. In this connection, it would be profitable to refer to the reported decision of the Supreme Court in the case of Gaunter Edwin Kircher v. State of Goa, Secretariat Panji, Goa, AIR 1993 SC 1456, wherein the Supreme Court has held as under:

> "We have to observe that to obviate this difficulty, the concerned authorities would do better if they send the entire quantity seized for chemical analysis so that there may not be any dispute of this nature regarding the quantity seized. If

> it is not practicable, in a given case, to send the entire quantity then sufficient quantity by way of samples from each of the packets or pieces recovered should be sent for chemical examination under a regular panchnama and as per the provisions of law."

11. Applying the principles laid down by the Supreme Court in the above referred to judgment to the facts of the present case, at the cost of repetition, be it stated that Gohil has recovered four packets of opium. Out of four packets, he has opened and sent to the FSL only one packet and, therefore, it is difficult to come to the conclusion as to whether the remaining three packets which were not opened and sent to the FSL contained contraband article opium. Therefore, doubt is raised whether remaining three packets contained contraband article opium.

12. Besides this so far as the method and manner of sealing of the sample of one packet of opium by the investigating officer was concerned, the same was defective. On having perusal of the FSL report at Ex.13 it is seen that FSL has not mentioned anything in what condition it received the muddamal and whether the seal was intact or not. The prosecution is also silent why the muddamal was kept for a longer period with the police when it was seized on 18.10.1989 and sent for chemical analysis on 26.10.1989. During the period when the muddamal was in the police station therefore possibility cannot be ruled out that it must have been tampered with because during this period there was no proper seal on the said sample.

13. One more defect which is noticed by us is that statutory requirements under Section 57 of the NDPS Act have not been complied with. As per Section 57 of the NDPS Act, investigating officer has to make a full report of all the particulars, next after arrest or seizure within forty-eight hours, to his immediate official superior, but that had not been done in the instance case.

14. In this connection, it would be appropriate to refer to the judgment of the Supreme court in the case of Gurubax Singh v. State of Haryana, AIR 2001 SC 1002. In the said case, the Supreme Court has said that failure of investigating officer to make a full report of all the particulars, next after arrest or seizure within forty-eight hours thereof, to his immediate official

superior as provided under Section 57 of the NDPS Act and where the conduct of panch witness is unusual as he offered himself to be a witness for search and seizure and contradiction as to nature of the seal used by the investigating officer, conviction of the accused under the circumstances was not proper.

15. Applying the principles laid down by the Supreme Court in the above referred to judgment to the facts of the present case, it can be seen that since the investigating officer has failed to make full report of all the particulars next within 48 hours to his immediate official superior provisions of Section 57 of the NDPS Act are violated, panchas have not supported, seal was not intact and three packets of contraband article opium out of four packets were not opened and not sent to FSL for chemical analysis and therefore on totality of the evidence and nonobservance of the statutory provisions contained under the NDPS Act, the charge against the respondent cannot be proved beyond doubt. In that view of the matter, benefit of doubt must go to the accused.

16. In view of the aforesaid infirmities, evidence of Gohil Railway PSI is not sufficient to connect the accused with the alleged crime and to hold him guilty of the offence with which he was charged.

17. In view of the aforesaid state of affairs and having regard to the nature of evidence produced by the prosecution which we have referred to hereinabove, it cannot be said that the learned Judge has committed any error in acquitting the accused of the offence with which he was charged after giving benefit of doubt to him.

18. This is an acquittal appeal in which the court would be slow to interfere with the order of acquittal. Infirmities in the prosecution case go to the root of the matter and strike a vital blow on the prosecution case. In such a case, it would not be safe to set aside the order of acquittal, more particularly when the evidence has not inspired confidence of the learned Judge who had the opportunity to observe demeanour of the witnesses. As we are in general agreement with the view expressed by the learned Judge, we do not think it necessary either to reiterate the evidence of prosecution witnesses or to restate the reasons for acquittal given by the trial Court and in our view the expression of general agreement with the view taken by the learned Judge would be sufficient in the facts of the present case. This is so, in view of the decisions rendered by the Supreme Court in the cases of (1) Girija Nandini Devi v. Bigendra

Chaudhari, AIR 1967 SC 1124 and (2) State of Karnataka v. Hema Reddy and another, AIR 1981 SC 1417.

19. In the case of Ram Kumar v. State of Haryana, AIR 1995 SC 280, Supreme Court has said that the powers of the High Court in an appeal from order of acquittal to reassess the evidence and reach its own conclusions under Sections 378 and 379 of the Code are as extensive as in any appeal against the order of conviction. But as a rule of prudence, it is desirable that the High Court should give proper weight and consideration to the view of the Trial Court with regard to the credibility of the witness, the presumption of innocence in favour of the accused, the right of the accused to the benefit of any doubt and the slowness of appellate Court in justifying a finding of fact arrived at by a Judge who had the advantage of seeing the witness. It is settled law that if the main grounds on which the lower Court has based its order acquitting the accused are reasonable and plausible, and the same cannot entirely and effectively be dislodged or demolished, the High Court should not disturb the order of acquittal.

20. On overall appreciation of evidence, we are satisfied that there is no infirmity in the reasons assigned by the learned Judge for acquitting the respondents. Suffice it to say that the learned Judge has given cogent and convincing reasons for acquitting the respondents and the learned APP has failed to dislodge the reasons given by the learned Judge in order to convince us to take the view contrary to the one already taken by the learned trial Judge.

21. Seen in the above context, as this appeal lacks merit, deserves to be dismissed by confirming the judgment and order of acquittal which is impugned under the appeal.

22. For the foregoing reasons the appeal fails and accordingly it is dismissed. The impugned judgment and order is confirmed. As the respondent/accused No.1 is on bail his bail bonds shall stand cancelled and sureties are discharged.

(A.M. Kapadia, J.)

(H.H. Mehta, J.)

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